

Fifth Amendment’s Double Jeopardy Clause. *United States v. Nielson*, 2016 WL 385837, at *5 (4th Cir. Feb. 2, 2016); *United States v. Shrader*, 675 F.3d 300, 313 (4th Cir. 2012). To determine whether an indictment is multiplicitous, the Court should apply the test set forth in *Blockburger v. United States*, 284 U.S. 299, 304 (1932)—whether each count charges a crime requiring proof of a fact which the other does not. *See Nielson*, 2016 WL 385837, at *6 (applying the *Blockburger* test to determine whether an indictment was multiplicitous); *United States v. Chandia*, 514 F.3d 365, 371-72 (4th Cir. 2008) (same). The indictment against Mr. Washington charges the same offense in two separate counts and is thus multiplicitous.

3. First, both counts in the indictment allege that Mr. Washington violated 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) by distributing heroin on December 27, 2011. The only distinction between the counts is that Count 1 alleges that death resulted from use of the heroin distributed—a fact the government must allege and prove beyond a reasonable doubt for sentencing purposes. *See, e.g., Alleyne v. United States*, 133 S. Ct. 2151, 2163-64 (2013). Otherwise, both counts have identical elements. In effect, Count 2 is a lesser included offense of Count 1. Consequently, Counts 1 and 2 fail the *Blockburger* test and are multiplicitous. *See Nielsen*, 2016 WL 385837, at *6 (explaining that “[a] greater offense and a lesser included offense are the ‘same’ offense for double jeopardy purposes”).

4. Second, both counts in the indictment are based on the same alleged conduct. According to the criminal complaint filed in this case, on December 27, 2011, Mr. Washington allegedly sold 6 grams of heroin to “Defendant 1.” After allegedly purchasing heroin from Mr. Washington, “Defendant 1” supplied a portion of the heroin to “Victim 1” for her personal use. The morning after “Victim 1” used the heroin, “Defendant 1” found “Victim 1” dead from an apparent overdose. There is no allegation in the criminal complaint—or supporting evidence in

the discovery thus far produced in this case—that Mr. Washington allegedly distributed heroin a second time on December 27, 2011.

5. Because the indictment is multiplicitous, the Court should require the government to dismiss one of the two counts in the indictment. *See United States v. Johnson*, 130 F.3d 1420, 1426 (10th Cir. 1997) (explaining the dangers of proceeding to trial on multiplicitous counts and stating that the “decision of whether to require the prosecution to elect between multiplicitous counts before trial is within the discretion of the trial court”).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2016 the foregoing was filed with the Court and served on all parties of record via the Court’s ECF system.

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